

STATE OF NORTH CAROLINA
COUNTY OF WAKE

MARK E. HARRIS,

Petitioner,

v.

THE NORTH CAROLINA BIPARTISAN
STATE BOARD OF ELECTIONS AND
ETHICS ENFORCEMENT a/k/a THE NORTH
CAROLINA STATE BOARD OF
ELECTIONS AND ETHICS
ENFORCEMENT,

Respondent,

and

DAN MCCREADY and MCCREADY FOR
CONGRESS,

[Proposed] Intervenor-
Respondents.

IN THE GENERAL COURT OF
JUSTICE
SUPERIOR COURT DIVISION
No. 19 CVS 0025

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS MARK HARRIS'S
PETITION FOR WRIT OF MANDAMUS

BY: DAN MCCREADY and MCCREADY
FOR CONGRESS

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NOW COME Proposed Intervenor-Respondents Dan McCready and McCready for Congress (the “Campaign”), and respectfully moves this Court to dismiss Petitioner Mark E. Harris’s (“Harris”) petition for the extraordinary and unwarranted relief of a writ of mandamus. Harris seeks to compel the North Carolina Bipartisan State Board of Elections and Ethics Enforcement a/k/a the North Carolina State Board of Elections and Ethics Enforcement (“the Board”) to certify the results of an election alleged to have been pervaded by fraud perpetrated, at least in part, by Harris’s own handpicked and paid agents.

A. INTRODUCTION

A writ of mandamus is an “extraordinary” remedy, *In re T.H.T.*, 362 N.C. 446, 453 (2008), which will *not* lie unless *all* of the following circumstances are present: (1) the party seeking relief has a clear legal right to the act requested; (2) the respondent has a legal duty to perform the act requested; (3) performance of the act at issue is ministerial in nature and does not involve the exercise of discretion; (4) the respondent did not perform the act requested and the time for performance of the act has expired; and (5) no alternative, legally adequate remedy is available. *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cty.*, 368 N.C. 360, 364 (2015) (citing *In re T.H.T.*, 362 N.C. at 453-54).

Harris’s demand for a writ of mandamus ordering that he be immediately certified as the winner of the Ninth Congressional District (“CD-9”) fails to satisfy even one—let alone all—of the legal requirements for the issuance of the writ. The Court should reject Harris’s petition.

First, Harris has no “clear legal right” to be certified as the winner, and the Board has no “clear and not reasonably debatable” duty to do so. To the contrary, publicly available evidence before the Board strongly suggests that Harris’s handpicked agent conducted wide-scale fraudulent activity in CD-9 for Harris’s benefit. The Board is acting well within its statutory obligation to withhold certification until it determines whether irregularities or improprieties occurred to such

an extent that they taint the results of the entire election and cast doubt on its fairness, which would require a new election. Harris attempts to undermine this inevitable conclusion by suggesting that the absence of a candidate-initiated protest nonetheless *requires* the Board to certify him. But he is simply wrong on the law: The Board has explicit statutory authority to withhold certification on its own initiative, as it has done here, and to order a new election (if necessary).

Second, Harris fails the other requirements for mandamus to lie. He cannot show that the act of certifying the election with a protest pending would not involve the exercise of the Board's discretion. He cannot show that the Board has neglected or refused to certify the election. He cannot show that the time for certifying the election has expired. And he cannot show that he lacks an alternative, legally adequate remedy. To the contrary, the Board has moved expeditiously to investigate the alleged irregularities associated with the CD-9 election, and although temporarily vacant due to the state Republican party's refusal to appoint interim members, the Board will be reconstituted and able to hold its previously scheduled evidentiary hearing in just three weeks' time.

B. FACTUAL AND PROCEDURAL BACKGROUND

On November 27, the Board declined to certify the results of the November 2018 election in CD-9 under its express authority to "take any . . . action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of the election." *See* N.C. Gen. Stat. § 163A-1180 (163-182.12). The Board reconvened on November 30, when, in another bipartisan decision, it again refused to certify the results of the race in CD-9 and further "decided to hold a public evidentiary hearing into claims of irregularities

and fraudulent activities related to absentee by-mail voting and potentially other matters in the [CD-9] contest.”¹

The full motion, which was approved by a vote of 7-2, was as follows:

I move that, in light of claims of numerous irregularities and concerted fraudulent activities related to absentee by-mail ballots and potentially other matters in Congressional District 9, the State Board hold, as then constituted, an evidentiary hearing on or before December 21 pursuant to its authority under G.S. §§ 163A-1180 and 163A-1181 to assure that the election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election; and that the Bladen County Board of Elections is hereby directed to withhold issuance of certificates of election in the following contests: Bladen County Commissioner District 3 and Bladen Soil and Water Conservation District Supervisor.²

That open matter is titled *In re. Investigation of election irregularities affecting counties within the 9th Congressional District*.

The Board took this extraordinary step after a years-long investigation into alleged absentee ballot fraud in Bladen County that has already resulted in referrals to state and federal prosecutors. The veritable mountain of evidence the Board has collected relates to an alleged absentee ballot fraud scheme conducted in Mark E. Harris’s favor in the 2018 election cycle at the direction of one of Harris’s paid agents, Leslie McCrae Dowless, Jr. (“Dowless”).

On December 5, the Board began to produce documentary evidence, on a rolling basis on the Board’s website, related to the alleged fraud and irregularities that took place in the 2018

¹ North Carolina State Board of Elections, Press Release: *State Board to hold public hearing into irregularities in 9th Congressional District Contest* (Nov. 30, 2018), https://www.ncsbe.gov/press-releases?udt_2226_param_detail=218.

² *Id.*

CD-9 contest.³ The production is now thousands of pages, and we expect it to continue to grow. The Board had previously confirmed that Dowless is a person of interest in their ongoing investigation and that it had subpoenaed documents from Red Dome Group, a consulting firm hired by Harris, and the Mark Harris for Congress Committee.⁴ On December 17, 2018, Chairman Malcolm issued an Order of Proceedings for the Evidentiary Hearing regarding alleged fraud and improprieties in CD-9, setting an evidentiary hearing in the matter of *In re. Investigation of election irregularities affecting counties within the 9th Congressional District* for January 11, 2019.⁵

But while the Board's investigation was proceeding apace, the Board was dissolved pursuant to unrelated litigation. In that case, the court found that the Board's authorizing statute—passed as one of many attempts by the Republican leadership of the General Assembly to usurp executive control over North Carolina's elections and their governing agency over the last two years—violated the North Carolina Constitution. The court initially stayed the

³ See generally N.C. State Bd. of Elections, Congressional Dist. 9 Portal, https://dl.ncsbe.gov/index.html?prefix=State_Board_Meeting_Docs/Congressional_District_9_Portal/.

⁴ Press Release, N.C. State Bd. of Elections, *State Board continues investigation into 9th Congressional District irregularities* (Dec. 7, 2018), https://www.ncsbe.gov/press-releases?udt_2226_param_detail=220 (“The agency confirms that Leslie McCrae Dowless Jr. is a person of interest in connection with an alleged absentee ballot operation in the congressional district.”).

⁵ *In the Matter of: Investigation of election irregularities affecting counties within the 9th Congressional District*, Ex. 6.1.1 Order of Proceedings issued December 17, 2018, https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/6.1.1%20Exhibit.pdf

injunction to allow for finalization of the November 2018 election, but the stay expired on December 27, 2018.⁶

The next day, on December 28, and less than two hours before the Board was set to disband pursuant to the expiration of stay, Harris filed an Emergency Petition to Certify the Election with the Board.⁷ In a letter responding to Harris's counsel regarding that petition, Chairman Malcolm made clear that, at least in part, Harris himself was responsible for the Board's delay in conducting its hearing:

As you know, [Harris] is under a subpoena dated December 1, but has made only one production on December 7 totaling 398 pages. Yet [Harris] through counsel indicated that you possess roughly 140,000 additional documents that may be responsive but have not yet been produced. We have received repeated assurances—as recently as December 24—regarding your efforts to comply with the subpoena. You are hereby requested to fully comply with the Board's subpoena so as not to further impact the agency's ability to resolve the investigation.

Staff at the agency have made several attempts to schedule an interview with [Harris]. On December 7 counsel for the Harris Committee by phone indicated [Harris] would be willing to sit for an interview following production of documents. [Harris] retained individual counsel and on December 24 agency staff sought to confirm his continued intent to be interviewed. We await confirmation of same.⁸

⁶ See generally Proposed Intervenor-Respondents' Motion to Intervene ("Mot. to Int."), ¶¶ 5-18.

⁷ *In re. Investigation of election irregularities affecting counties within the 9th Congressional District*, Emergency Petition to Certify Election (Dec. 28, 2018), [https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Misc.%20Documents/Correspondence_Emergency%20Petition%20to%20Certify%20Election%20\(Harris%20campaign\)_12282018.pdf](https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Misc.%20Documents/Correspondence_Emergency%20Petition%20to%20Certify%20Election%20(Harris%20campaign)_12282018.pdf).

⁸ Letter from Joshua D. Malcolm, Chair, N.C. State Bd. of Elections & Ethics Enforcement, to Alexander Dale, at 3 (Dec. 28, 2018), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Misc.%20Documents/Correspondence_HarrisCommittee_2018-12-28.pdf.

Shortly thereafter, Governor Cooper sought to appoint an interim five-member Board on December 28, 2018,⁹ which would have allowed the January 11, 2019 evidentiary hearing in the matter of *In re. Investigation of election irregularities affecting counties within the 9th Congressional District* to take place as scheduled.

However, the North Carolina Republican Party refused to submit a list of nominees to serve on an interim Board.¹⁰ As a direct result of the Republican Party's refusal to make nominations to an interim Board, Harris's delay in cooperating with the Board's investigation and in responding to its subpoenas, and the time gap imposed by HB 1029, there is now no interim Board and the January 11, 2019 hearing has been postponed.¹¹

Instead, the Board will be reconstituted once Governor Cooper makes appointments after January 31, pursuant to HB 1029.¹²

⁹ See Press Release, NC Governor Roy Cooper, *Cooper Office Statement on Temporary Elections Board Appointments* (Dec. 28, 2018), <https://governor.nc.gov/news/cooper-office-statement-temporary-elections-board-appointments> (including a link to General Counsel McKinney's letter).

¹⁰ See Press Release, NC Governor Roy Cooper, *Republicans Refuse to Put Forward Nominees to Current State Board of Elections, Blocking Action on Election Fraud Investigation: Failure to provide names as required by law will derail Jan. 11 hearing planned to address 9th Congressional District investigation* (Jan. 2, 2019), <https://governor.nc.gov/news/republicans-refuse-put-forward-nominees-current-state-board-elections-blocking-action-election>.

¹¹ See N.C. State Bd. of Elections, *State Board Meetings*, <https://www.ncsbe.gov/index.html> (last visited Jan. 12, 2019) ("The public evidentiary hearing into irregularities in the 9th Congressional District election, previously scheduled on January 11, 2019 has been POSTPONED.").

¹² See N.C. Sess. Law 2018-146 (HB 1029), § 3.2(a); *id.* § 3.6, <https://www.ncleg.gov/Sessions/2017/Bills/House/PDF/H1029v6.pdf>.

Per a notice recently posted by Board staff, once the State Board of Elections is seated, the chair or members are expected to promptly calendar a new date for the evidentiary hearing.¹³

Despite the absence of Board members, Board staff has continued its investigation into alleged absentee ballot fraud in the CD-9 race.¹⁴ Indeed, Harris finally relented and submitted himself to be interviewed by Board investigators on January 3, 2019.¹⁵ Also on January 3, before his nearly two-hour interview with Board investigators regarding the ongoing investigation into alleged fraud, misconduct, and other improprieties by his agents, Harris filed the instant Petition for Writ of Mandamus and Appeal from the Failure of State Board to Act. That same day, all interested parties were directed by the Court to file responsive briefs by 5:00 p.m. on Monday, January 14, 2019.

C. STANDARD OF REVIEW

“The writ of mandamus is an order from a court of competent jurisdiction to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law.” *Morningstar Marinas*, 368 N.C. at 364 (citing *Sutton v. Figgatt*, 280 N.C.

¹³ N.C. State Bd. of Elections, Notice regarding Calendared deadlines identified in Order of Proceedings (Jan. 8, 2019), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/6.1.3%20Exhibit.pdf.

¹⁴ Press Release, N.C. State Bd. of Elections, *State Board continues investigation into 9th Congressional District irregularities; January 11 hearing postponed* (Jan. 2, 2019), https://www.ncsbe.gov/press-releases?udt_2226_param_detail=223 (““State Board staff will continue to interview witnesses and pursue leads as part of this investigation,” said Kim Westbrook Strach, executive director of the State Board of Elections. “This agency remains steadfast in its obligation to ensure confidence in the elections process.””).

¹⁵ See Press Release, N.C. State Bd. of Elections, *Statement from Executive Director* (Jan. 3, 2019), https://www.ncsbe.gov/press-releases?udt_2226_param_detail=222 (“Dr. Harris and his two attorneys met with Chief Investigator Joan Fleming and me for nearly two hours Thursday morning. We appreciate his cooperation in the ongoing investigation.”).

89, 93 (1971)). “A writ of mandamus is an appropriate remedy [*only*] when the following circumstances are present: (1) the party seeking relief has ‘a clear legal right to the act requested’; (2) the respondent has ‘a legal duty to perform the act requested’; (3) performance of the act at issue is ‘ministerial in nature and [does] not involve the exercise of discretion’; (4) the respondent did not perform the act requested and the time for performance of the act has expired; and (5) no ‘alternative, legally adequate remedy’ is available.” *Id.* (2nd alteration in original) (quoting *In re T.H.T.*, 362 N.C. at 453-54). If any of these elements is *not* present, mandamus cannot lie. *In re T.H.T.*, 362 N.C. at 453; *see also Graham Cty. Bd. of Elections v. Graham Cty. Bd. of Comm'rs*, 212 N.C. App. 313, 322 (2011).

D. ARGUMENT

1. Harris Fails to Demonstrate Each of the Five Requirements to Obtain a Writ of Mandamus.

A writ of mandamus is an “extraordinary” court order and should only be used in a narrow set of circumstances. *See, e.g., In re T.H.T.*, 362 N.C. at 453. Although Harris recites the requirements of a (federal law) writ of mandamus,¹⁶ he neglects to even allege—much less prove—each of the elements required to issue the writ under North Carolina law.

¹⁶ Harris’s petition recites the elements of a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651, rather than a writ of mandamus issued pursuant to North Carolina law. *See Harris Petition for Writ of Mandamus and Appeal from the Failure of State Board to Act (“Harris Pet.”)* at 11 (citing *Earley v. Braxton (In re Braxton)*, 258 F.3d 250, 260-61 (4th Cir. 2001)).

a. Harris Has No Clear Right to Be Certified as the Winner of the Congressional District 9 Election, and the Board Has No Duty to Certify Him Under these Circumstances.

Harris has no clear right to be certified as the winner of the CD-9 election, and the Board has no duty to certify him under these circumstances. Harris's petition can be denied on this basis alone.

The North Carolina Supreme Court has long held that the legal right which the petitioner seeks to effectuate through a mandamus petition must be "clear" and the Board's duty to perform the act requested must be "clear and not reasonably debatable." *See In re T.H.T.*, 362 N.C. at 453-54. However, Harris's asserted "right" to be certified is anything but clear.

(i) The Board's Decision to Postpone Certification to Investigate and Hold an Evidentiary Hearing on Election Irregularities is Well-Supported by the Evidence Already in the Public Record.

First, Harris avers that he has a clear right to be certified simply because, in his opinion, the facts before the Board do not warrant the calling of a new election. Respectfully, this is not Harris's call to make, and the Court should decline Harris's invitation to drag the judiciary into the initial factfinding duties that North Carolina law expressly delegates to the Board.

Harris argues that the issuance of the writ of mandamus is proper because "no facts have been presented by the State Board or any other party indicating that election irregularities affected the result of the election or that the extraordinarily high standard for calling a new election has been met." Harris Pet. at 13. First, the Board is *not* required to conclusively determine that the outcome would have been different but for the alleged fraud before ordering a new election. Instead, the Board has the clear authority to order a new election under two different sets of circumstances: when irregularities affected a sufficient number of votes to change the outcome of the election, N.C. Gen. Stat. § 163A-1181(a)(1)-(3) (163-182.13(a)(1)-

(3)), or when “irregularities or improprieties occurred to such an extent that they taint the results of the entire election and cast doubt on its fairness,” *id.* § 163A-1181(a)(4) (163-182.13(a)(4)).¹⁷ But in any event, Harris’s statement is at odds with the evidence already in the public record, which clearly suggests that alleged fraud was sufficient to impact the outcome of the very close race.

Available evidence strongly suggests that Dowless—a political operative who Harris admitted to personally hiring, and with whom Harris repeatedly admitted to communicating “frequently” during the campaign¹⁸—organized a small army of individuals paid in cash to engage in absentee ballot fraud in *at least* two counties on Harris’s behalf in the months leading up to the November 2018 election.¹⁹ This evidence includes, among other things, thousands of

¹⁷ This makes sense, given the virtual impossibility of determining, with precision, exactly how many ballots might have been impacted by Dowless and his scheme which is alleged to span *at least* two counties in CD 9 and to have employed dozens of people. *See, e.g., In the Matter of: Investigation of election irregularities affecting counties within the 9th Congressional District*, Ex. 7.1.2.2 McCready evidentiary exhibits submitted under Paragraph 8 of the Order of Proceedings, [https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/7.1.2.2%20Exhibit%20\(McCready\).pdf](https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/7.1.2.2%20Exhibit%20(McCready).pdf). at 33-34 (Willis Aff.); *id.* at 35-36 (Snyder Aff.).

¹⁸ *See* Nick Oschner, *Exclusive: Mark Harris addresses voter fraud allegations in race for 9th Congressional District*, WBTV.com (Dec. 14, 2018), <http://www.wbvtv.com/2018/12/14/exclusive-mark-harris-addresses-voter-fraud-allegations-race-th-congressional-district/>; Paul Boyd, *Channel 9 sits down with Mark Harris in one-on-one interview*, wsocTV.com (Jan. 9, 2019), <https://www.wsocTV.com/news/local/channel-9-sits-down-with-mark-harris-in-one-on-one-interview/901229496>.

¹⁹ *See, e.g., Ex. 7.1.2.2 at 39-40 (Dunn Aff.)* (averring that Dowless said he only accepts cash payments and that he had over eighty (80) people working for him between Cumberland County and Charlotte in the Harris race); *see also* Brianna Sacks & Otilia Steadman, *Inside the North Carolina Republican Vote Machine: Cash, Pills—and Ballots*, BuzzFeed News (Dec. 5, 2018), <https://www.buzzfeednews.com/article/briannasacks/dowless-britt-inside-north-carolina-absentee-ballot-machine> (One of Dowless’s employees who also happens to be his stepdaughter

pages of official documents collected and released publicly by the Board,²⁰ multiple televised admissions by paid members of Dowless's enterprise,²¹ affidavits submitted by dozens of impacted voters, election officials, and other witnesses,²² and a statistical analysis by a leading elections scholar explaining how the anomalies in Bladen and Robeson counties, in particular, are consistent with a pattern of organized absentee ballot fraud.²³ The evidence suggests that Dowless and his associates are known to have submitted well over 500 absentee ballot requests in Bladen County²⁴—some of which are alleged to have been forged,²⁵ that Dowless and his

told reporters that Dowless “paid me a certain amount in cash and then the Board of Elections paid me the rest.”).

²⁰ See generally N.C. State Bd. of Elections, Congressional District 9 Portal, https://dl.ncsbe.gov/index.html?prefix=State_Board_Meeting_Docs/Congressional_District_9_Portal/.

²¹ See, e.g., Joe Bruno, *Channel 9 uncovers similarities between absentee ballots in U.S. House District 9 race*, wsocvtv.com (Dec. 4, 2018), <https://www.wsocvtv.com/news/local/channel-9-uncovers-similarities-between-absentee-ballots-in-us-house-district-9-race/882660808>; Joe Bruno, *Second woman claims she was paid to pick up ballots in U.S. House District 9 race*, wsocvtv.com (Dec. 5, 2018), <https://www.wsocvtv.com/news/local/second-woman-claims-she-was-paid-to-pick-up-ballots-in-us-house-district-9-race/883177036?nowrap>; Sacks & Steadman, *supra* note 19.

²² Ex. 7.1.2.2.

²³ See *id.* at 48-96 (Affidavit of Dr. Stephen Ansolabehere, Ph.D.).

²⁴ *In the Matter of: Investigation of election irregularities affecting counties within the 9th Congressional District*, Ex. 4.2.3.1.1: Office record maintained by the Bladen County Board of Elections logging in-person delivery of Absentee Ballot Request Forms (August 22 through October 30, 2018), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/4.2.3.1.1%20Exhibit.pdf.

²⁵ See, e.g., Ex. 7.1.2.2 at 10-12 (Affidavit of Douglas Bullard); *id.* at 18-20 (Affidavit of Lonnie Bullard Aff.).

associates collected unsealed and/or unvoted absentee ballots from voters and turned them in,²⁶ that Dowless and his associates completed witness affidavits outside the presence of the absentee voter,²⁷ that some ballots collected by Dowless and his known associates were never returned,²⁸ that Bladen County elections officials may have aided Dowless's enterprise by providing him with unredacted absentee ballot request forms and improperly tabulating and releasing early voting results to him,²⁹ and that in the 2018 primary election, Dowless was observed to have in his possession hundreds of absentee ballots.³⁰

Moreover, the evidence further suggests that Dowless has been engaged in a pattern of brazen and widely-known absentee ballot fraud *for years*,³¹ that Dowless's clients in previous

²⁶ See, e.g., *id.* at 7-8 (Affidavit of Christopher Eason); *id.* at 9 (Affidavit of Datesha Montgomery); *id.* at 13-15 (Affidavit of Emma Shipman); see also Richard Fausset et al., *North Carolina's 'Guru of Elections': Can-Do Operator Who May Have Done Too Much*, The New York Times (Dec. 8, 2018), <https://www.nytimes.com/2018/12/08/us/politics/north-carolina-election-fraud-dowless.html>.

²⁷ See, e.g., Sacks & Steadman, *supra* note 19.

²⁸ See, e.g., Ex. 7.1.2.2 at 44-45 (Affidavit of Jens Lutz ("Lutz Aff.")), *id.* at 35-36 (Affidavit of Ben Snyder).

²⁹ See, e.g., *id.* at 33-34 (Affidavit of Agnes Willis); *id.* at 44-45 (Lutz Aff.).

³⁰ See, e.g., *id.* at 47 (Affidavit of Kenneth Simmons).

³¹ See e.g., *In re. Investigation of election irregularities affecting counties within the 9th Congressional District*, Ex. 2.2.2.1 2016 general election investigative reports on activity in Bladen County referred to prosecutors by the State Board of Elections, https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/2.2.2.1%20Exhibit.pdf; Amy Gardner & Beth Reinhard, *Republican officials had early warnings of voting irregularities in North Carolina* (Dec. 6, 2018), https://www.washingtonpost.com/politics/republican-officials-had-early-warnings-of-voting-irregularities-in-north-carolina/2018/12/06/b3e5c6d4-f8bf-11e8-8c9a-860ce2a8148f_story.html?utm_term=.6effceec2e3c (citing past elections where candidates who had hired Dowless benefitted from anomalous absentee ballot success).

elections received absentee ballot vote totals so alarmingly lopsided that Harris asked an attorney to investigate (before Harris subsequently decided to retain Dowless to assist *him* in the next election),³² and that allegations against Dowless were reported to leadership within the North Carolina Republican Party by his victims³³ and were evidenced by Dowless's own testimony in a 2016 public hearing before the Board.³⁴ While seriousness of the allegations against Dowless is undeniable, Harris continues to tell reporters that, despite all of the evidence to the contrary, that Dowless is innocent³⁵ and asks this Court—with the support of the North Carolina Republican Party³⁶—to rubber stamp the results of the election with which Dowless and his associates are alleged to have interfered on Harris's behalf.

In the end, however, this Court need not accept Harris's invitation to weigh the facts and make a determination about the extent to which irregularities tainted the results of the election. Rather, the fact that the Board has before it a body of evidence that is at the very least *suggestive*

³² Steve Harrison, *Mark Harris On Dowless Absentee Results: 'Why Would I Expect Success Was A Bad Thing?'*, WFAE.org (Jan. 8, 2019), <https://www.wfae.org/post/mark-harris-dowless-absentee-results-why-would-i-expect-success-was-bad-thing#stream/0>.

³³ See, e.g., Lisa Worf, *Pittenger Didn't Claim Election Fraud In Primary, Saying 'Nobody Likes A Whining Sore Loser'*, WFAE.org (Jan. 2, 2019), <https://www.wfae.org/post/pittenger-didn-t-claim-election-fraud-primary-saying-nobody-likes-whining-sore-loser#stream/0>.

³⁴ See, e.g., Hearing transcript, *In re: Protest of Leslie McCrae Dowless, Jr., State Board of Elections* (Dec. 3, 2016), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2016-12-03/Transcript_of_Hearing.pdf at 138-79.

³⁵ See, e.g., Paul Boyd, *Chanel 9 sits down with Harris in one-on-one interview*, wscotv.com (Jan. 9, 2019), <https://www.wsocv.com/news/local/channel-9-sits-down-with-mark-harris-in-one-on-one-interview/901229496>.

³⁶ See, e.g., Ethan Cohen & Curt Devine, *GOP candidate will ask NC court to certify results of disputed election*, CNN Politics (Jan 2, 2019), <https://www.cnn.com/2019/01/02/politics/north-carolina-election-board-district-9-hearing-postpone/index.html>.

of wide-scale fraudulent activity in CD-9 conducted on Harris's behalf is itself enough: Harris does not have a clear legal right to be certified as the winner of the CD-9 election, and the Board has no "clear and not reasonably debatable" duty to do so. *See In re T.H.T.*, 362 N.C. at 453-54. Indeed, resolving these contested factual issues is the very purpose of the Board's investigation and of the evidentiary hearing scheduled to take place before the Board.

(ii) The Board Has Clear Statutory Authority to Postpone Certification Pending Resolution of its Investigation and an Evidentiary Hearing, and that Proceeding is Still Pending Before the Board.

Second, perhaps realizing that the factual issues in the proceeding before the Board remain very much unresolved, Harris attempts a different and even less persuasive argument. Instead of asserting that the factual record in the protest pending before the Board is so overwhelmingly in his favor that he must be certified immediately, Harris argues that there is no "protest" pending before the Board at all. *See Harris Pet.* at 17. Harris fixates upon a single sentence in N.C. Gen. Stat. § 163A-1184(b) (163-182.15(b)), which states that the Board shall certify the election "unless there is an election protest pending." Observing that neither Mr. McCready nor any other voter has "filed an election protest," Harris arrives at a surprising conclusion: there is no "protest" and the Board is therefore obligated to immediately certify him as the winner. Harris's argument, which turns on a fundamental misreading of the plain text of the relevant statute, blinks reality and contravenes decades of precedent.

Indeed, the Board itself has initiated the protest of the 2018 election in CD-9. Under relevant provisions of North Carolina law, the term "protest" has a specific definition: "Protest" means a complaint concerning the conduct of an election which, if supported by sufficient evidence, may require remedy by," among other things, a new election. N.C. Gen. Stat. § 163A-1165(4) (163-182.16). Nothing in that statutory definition indicates that a "protest" can *only* be a

complaint filed or initiated by an affected candidate or voter. In fact, the statute titled “Authority of State Board over protests” affords the Board broad authority over protests and expressly states that the Board “may initiate and consider complaints on its own motion”:

The State Board may consider protests that were not filed in compliance with G.S. 163A-1177, *may initiate and consider complaints on its own motion*, may intervene and take jurisdiction over protests pending before a county board, and may take any other action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election.

N.C. Gen. Stat. § 163A-1180 (163-182.12) (emphasis added). In addition, North Carolina law provides that the Board is ultimately responsible for issuing the certificate of election for a Congressional election, but if an election protest is pending, the State Board need not issue the certificate of election until after the final decision of the Board on the election protest (or after entry of a final court order if the board’s decision is appealed). *See* N.C. Gen. Stat. § 163A-1184(b)(1)-(2) (163-182.15(b)(1)-(2)).

Taken together, North Carolina law is clear that the Board may, on its own initiative, take action to ensure that a Congressional election was not tainted by fraud, order a new election if it determines either that such fraud affected enough ballots to change the outcome or that such fraud tainted the entire election and casts doubt on its fairness, and need not certify the election until it issues its final decision. And this is precisely what the Board has undertaken in *In re. Investigation of election irregularities affecting counties within the 9th Congressional District*: it invoked its authority under N.C. Gen. Stat. §§ 163A-1180 (163-182.12) and 163A-1184 (163-182.15) to assure that the election was determined without taint of fraud or corruption *or* without irregularities that may have changed the result of an election, scheduled an evidentiary hearing to

make that determination, and withheld certification of the CD-9 election pending the outcome of the hearing.

The Board's clear authority to postpone certification pending the resolution of a Board-initiated complaint is nothing new. Indeed, even under older statutory schemes that did not expressly state that the Board could initiate and consider complaints on its own motion, North Carolina courts nonetheless consistently held that "the authority of the State Board to conduct [a] public inquiry and enter an order calling for a new election [i]s not dependent upon a protest having been previously filed." *See Appeal of Judicial Review by Republican Candidates for Election in Clay Cty.*, 45 N.C. App. 556, 559 (1980) (citing *Sharpley v. Bd. of Elections*, 23 N.C. App. 650 (1974)). Rather, these courts found that the statute giving the Board the general responsibility to investigate fraud itself provided ample authority for the Board to initiate and act on complaints on its own motion, and to order new elections if necessary.

Indeed, Harris's proffered reading of the statutory scheme is absurd on its face. Harris apparently believes that the Board must delay the certification of an election when a protest filed by a candidate is pending (regardless of whether the protest is even plausibly likely to succeed), but that the Board is simultaneously *obligated* to immediately certify an election if a candidate does not file a protest—even when the bipartisan Board, assisted by nonpartisan career civil servant investigatory staff, independently reaches the conclusion that fraud may have tainted the results of that election and requires further investigation. This is not the law and never has been.³⁷

³⁷ Harris spends several pages of his petition ruminating on the Elections Clause of the U.S. Constitution and on the theory of separation of powers, eventually reaching the conclusion that the Board somehow violated the U.S. Constitution and possibly the North Carolina Constitution by failing to immediately certify Harris as the winner of the election. Harris Pet. at 13-17. But

(iii) *Furgieue v. State Board*, a Case Involving an Election for Which No Protest or Other Proceedings Were Pending, is Plainly Distinguishable

Harris's extraordinary and unwarranted request for this Court to certify him as the winner of the CD-9 election finds no support in *Furgieue v. State Board*, a case involving vastly different facts than the case at bar. See Order Issuing Writ of Mandamus, *Furgieue v. State Bd.*, No. 17 CVS 15132 (N.C. Super. Ct., Dec. 14, 2017). This unpublished decision is inapposite for at least two reasons: (1) unlike the case at bar, there was no seated Board at any time during the election or subsequent proceedings in *Furgieue*; and (2) unlike the case at bar, there was final agency action on the protest in *Furgieue*.

In *Furgieue*, a registered voter filed an election protest before a county board of elections concerning town council elections that took place in November 2017, and the county board of elections unanimously dismissed the protest. See *id.*, ¶¶ 1-6. Ordinarily, a protestor would be able to appeal the county board's decision to the Board. See N.C. Gen. Stat. § 163A-1179 (163-182.11). But beginning in June of 2017 and continuing through the November 2017 election and the protest proceedings in November and December of 2017, the Board lacked seated members due to court orders issued in *Cooper v. Berger*, 17 CVS 5084.³⁸ See *Furgieue*, ¶ 3. Because there was no seated Board, counsel to the Board informed the protestor that the Wake

this tack—a transparent attempt to put a constitutional gloss on his argument that there is no “protest” pending—is unavailing for the same reasons discussed above. North Carolina law affords the Board clear authority to postpone certification of an election pending the resolution of a Board-initiated complaint relating to irregularities that cast doubt on the fairness of that election.

³⁸ This was the second suit in which the Republican legislature's alterations to the Board's structure were eventually declared unconstitutional by the North Carolina Supreme Court. See Mot. to Int., ¶¶ 5-18.

County Superior Court was the proper forum for the appeal of the county's board final decision on her protest. *See id.*, ¶ 6. The protestor did not appeal to the court, and her appeal deadlines ran. *See id.*, ¶¶ 6-7. At that point, the *Furgiuele* petitioners sought a writ of mandamus from Wake County Superior Court directing the Executive Director of the Board to direct the county board to certify the petitioners as the winners of their elections, which the court granted. *See id.*, ¶¶ 1, 7-10.

While Harris implies that *Furgiuele* somehow supports his request to be certified as the winner of the CD-9 election, *see Harris Pet. at 12-13*, *Furgiuele* is plainly inapposite.

First, unlike the case at bar, there was no seated Board *at any point* during the contested election in *Furgiuele* or the protest that followed, nor was it clear *when* a new Board might be seated because of ongoing litigation. Here, by contrast, there was a seated Board at the time of the election in CD-9, and the Board properly exercised its authority in declining to certify the results and issuing a bipartisan order to institute a protest and order a public inquiry, an order which remains in effect today. Moreover, a new Board will be appointed in a matter of weeks, on January 31, 2019, and an evidentiary hearing on this pending investigation is expected to occur shortly thereafter. To the extent that the *Furgiuele* court's decision to afford mandamus relief depended on uncertainty about when the Board would be able to exercise its delegated responsibilities, such circumstances are simply not present in the case at bar.

Second, and more fundamentally, unlike the case at bar, *Furgiuele* involved final administrative decision on the protest at issue, and that final administrative decision by the county board was to find the protest meritless. The *Furgiuele* court held that in the absence of an appointed Board, the county board's decision on the election protest was final and lacked any additional administrative process, and any appeal from the county board lay with the Wake

County Superior Court. *See Furgiuele*, ¶ 7. Because the protest was not timely appealed, despite notice from Board counsel to the protestor of relevant deadlines and the superior court's jurisdiction over the appeal, the *Furgiuele* court found that the county board was required to certify the results of the election "*in the absence of a pending protest.*" *See id.*, ¶ 9 (emphasis added). In other words, there was no proceeding pending through which a new election might be ordered, and no question that the *Furgiuele* petitioners were entitled to be certified as the winners. As a result, the *Furgiuele* court found that the Petitioners had "established a clear legal right to the immediate issuance of the certificates of election *under the present circumstances.*" *See id.*, ¶ 10 (emphasis added). Here, by contrast, there *is* a protest pending for which there has been no final administrative action—much less a final decision by the Board that its own protest is meritless. Moreover, unlike *Furgiuele*, final agency action is *imminent*, as a new Board will be appointed on January 31, 2019, and its hearing into the irregularities and alleged fraud in CD-9 and decision to either certify the results or order a new election are expected to occur shortly thereafter.

In the end, *Furgiuele* stands for the uncontroversial proposition that mandamus may be appropriate to order the issuance of a certificate of election when no election protest is pending, no stay of certification has been issued by the Wake County Superior Court, no Board is seated, *and* it is not known when a new Board will be seated. Because *In re. Investigation of election irregularities affecting counties within the 9th Congressional District* remains pending before the Board, and the Board is set to reconvene on or around January 31, *Furgiuele* provides Harris no support for his extraordinary and unwarranted request.

b. Resolution of *In re. Investigation of election irregularities affecting counties within the 9th Congressional District* Necessarily Involves the Exercise of the Board's Discretion.

For mandamus to issue, “performance of the duty-bound act must be ministerial in nature and not involve the exercise of discretion.” *In re T.H.T.*, 362 N.C. at 454. The act in question here, however, is *not* ministerial in nature and necessarily involves the exercise of discretion. Here, Harris asks the Court to step in and resolve in his favor the central factual and legal question currently pending before the Board: whether fraud allegedly perpetrated by Harris’s own agents affected enough ballots to change the outcome of the CD-9 election *or* tainted the entire election and casts doubt on its fairness. *See* N.C. Gen. Stat. § 163A-1181(a) (163-182.13(a)). Resolving factual and legal claims in a contested election protest involves weighing evidence and applying the law—a quintessentially discretionary act. *See, e.g., Batdorff v. N. Carolina State Bd. of Elections*, 150 N.C. App. 108, 113 (2002) (finding that Board’s decision not to take further investigatory actions with respect to campaign finance complaint was a discretionary act undertaken in its investigatory and quasi-judicial capacity) (“[I]t is not the role of the trial court or our Court to direct the Board of Elections in what manner to exercise its discretion.”); *see also Appeal of Judicial Review by Republican Candidates for Election in Clay Cty.*, 45 N.C. App. at 559 (noting the Board’s inherent authority hear and act on complaints, including on its own motion). Moreover, North Carolina law specifically directs the Board to exercise discretion in carrying out these duties. *See* N.C. Gen. Stat. § 163A-1180 (163-182.12) (directing that the Board “may take any other action necessary to assure that an election is determined without taint of fraud or corruption and without irregularities that may have changed the result of an election”); § 163A-1181 (163-182.13) (authorizing the Board to order a new election when it determines that “[i]rregularities or improprieties occurred to such an extent that

they taint the results of the entire election and cast doubt on its fairness.”). The act in question here involves the exercise of discretion; accordingly, mandamus is not appropriate.

c. The Board Has Not Neglected or Refused to Perform the Certification, the Time for Certification of the Election Has Not Expired, and the State Board’s Long-Established Procedures Provide a More than Adequate Means for Harris to Attain Certification.

Finally, Harris fails to make out the other required elements for mandamus to issue. In particular, he cannot show that the Board has neglected or refused to certify the election and that the time for certification of the election has expired, nor can he show that there is no alternative, legally adequate remedy. *See In re T.H.T.*, 362 N.C. at 454.

To the contrary, the Board has moved expeditiously to investigate the alleged irregularities associated with the CD-9 election. It has reportedly interviewed over 100 witnesses,³⁹ regularly posted thousands of pages of documents associated with its investigation, promulgated an Order of Proceedings with deadlines for briefing, the submission of evidence, and established procedures for an evidentiary hearing.⁴⁰ In addition, the Board set and was prepared to hold an evidentiary hearing on January 11, 2019. That hearing was postponed not because of the Board, but rather because the Republican legislature decided that the provisions

³⁹ Associated Press, *New documents show strange handling of absentee ballots in North Carolina: And an outside analysis found that rates of unreturned absentee ballots in two of the state’s 9th District counties were “extreme statistical outliers,”* NBC News (Dec. 24, 2018), <https://www.nbcnews.com/news/amp/ncna951571> (“In a separate matter before state judges, elections board Chairman Joshua Malcolm said in an affidavit Friday that the board’s investigative staff members have conducted 100 interviews related to the election irregularities and are reviewing more than 182,000 documents produced from 12 subpoenas.”)

⁴⁰ *In re. Investigation of election irregularities affecting counties within the 9th Congressional District*, Ex. 6.1.1, Order of Proceedings, https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/6.1.1%20Exhibit.pdf.

regarding the new five-member Board would not take effect until January 31, 2019, and the North Carolina Republican Party unilaterally refused to nominate members of an interim Board that could preside over a January evidentiary hearing. In the meantime, the Board's investigation has continued apace, and the Board's staff expects that once the new State Board of Elections is seated in early February, the chair or members are expected to calendar a new date for the evidentiary hearing.⁴¹

Nor has the time for certification of the election expired. As discussed above, the statutory timelines for certificates of election to issue only apply in the absence of a pending election protest (or a stay issued by the Wake County Superior Court). *See* N.C. Gen. Stat. § 163A-1184(b) (163-182.15(b)). While the citizens of any Congressional district are undoubtedly prejudiced when they lack a representative in Congress, Harris himself and his party bear substantial responsibility for the current state of affairs. Had Harris sought to expedite the conclusion of the investigation, he could have timely complied with the Board's subpoena and urged his Party to appoint members of an interim Board for January. Instead, he slow-walked his production (producing less than 4,000 out of 140,000 potentially responsive documents to date)⁴² and opposed the creation of an interim board.⁴³

⁴¹ N.C. State Bd. of Elections, *Agency notice regarding Calendared deadlines identified in Order of Proceedings Issued December 17, 2018* (Jan. 8, 2018), https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/6.1.3%20Exhibit.pdf.

⁴² *See* Allison Latos (@AllisonWSOC9), TWITTER (Jan. 8, 2018), <https://twitter.com/AllisonWSOC9/status/1082659997526487044> ("I just confirmed with @NCSBE that Sunday night the @MarkHarrisNC9 campaign handed over 3,500 NEW documents & some spreadsheets related to the #NC09 election fraud investigation.").

⁴³ *See* Harris Pet. at 11.

Moreover, Harris has a perfectly adequate remedy to obtain certification: he can participate fully in the Board's investigation (which is ongoing) and in the Board's evidentiary hearing (which can be calendared on or shortly after January 31, 2019). If the Board declines to certify the election in his favor after the evidentiary hearing, Harris can exercise his right of appeal to the Superior Court of Wake County. *See* N.C. Gen. Stat. § 163A-1183 (163-182.14) (providing that an aggrieved party has the right to appeal the final decision of the Board to the Superior Court of Wake County); *King v. Baldwin*, 276 N.C. 316, 321 (1970) (“[W]hen the legislature has provided an effective administrative remedy, it is exclusive.”). While Harris may prefer to skip an evidentiary hearing and run straight to court, Harris's preference is not a legally sufficient basis for mandamus to issue.

2. Harris's Petition Should Not Be Construed to Be an Appeal of a Final Decision of the Board Because, As Harris Correctly Admits, the Board Has Not Issued an Appealable Final Decision

Harris's half-hearted alternative argument that his petition could be construed as an appeal of a final decision of the Board pursuant to N.C. Gen. Stat. § 163A-1183 (163-182.14) should be dismissed because, as Harris correctly admits, the Board has not issued an appealable final decision. *See* Harris Pet. at 12-13 (“Petitioner does not assert a denial of certification has occurred here”). For once, Harris is right on the law. Under N.C. Gen. Stat. § 163A-1183(b) (163-182.14(b)), “an aggrieved party has the right to appeal *the final decision* to the Superior Court of Wake County within 10 days of the date of service.” (emphasis added). The Board has not issued a final decision declining to certify Harris as the winner of the CD-9 election and calling for a new election. The Board's inability to certify the election or call for a new election for the limited period from January 1 to January 31 does not therefore mean the Board (or any other entity) has issued an appealable final decision on the pending protest, and Harris cites no

authority to the contrary. Rather, the Board can and will issue a final decision after it is reconstituted on or around January 31, 2019.

E. CONCLUSION

For the foregoing reasons, Proposed Intervenor-Respondents Dan McCready and McCready for Congress respectfully move the Court for an order denying Harris's petition for a writ of mandamus and dismissing this action with prejudice.

Dated: January 14, 2019

Respectfully submitted,

By 

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*Motion for Admission *Pro Hac Vice* Pending

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS MARK E. HARRIS'S PETITION FOR WRIT OF MANDAMUS** has been served upon all parties to this matter by US Mail and electronic mail:

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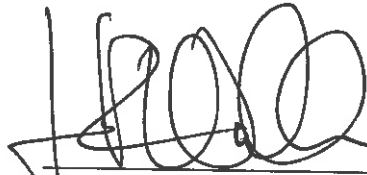
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This the 14th day of January, 2019.

By:

A handwritten signature in black ink, appearing to read 'J. Wallace', written over a horizontal line.

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